No. 48416-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LOGAN JOSEPH NEWLAND,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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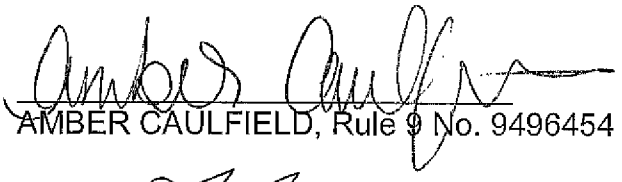
Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: 
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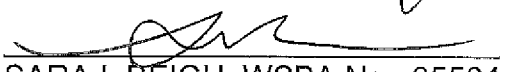
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I. ISSUES PRESENTED FOR REVIEW

1. Whether Newland received effective assistance of counsel when his trial counsel did not object to expert testimony and closing arguments regarding grooming both generally and specifically throughout the course of trial when the testimony was used to explain the behavior and emotional state of the victim.

2. Whether the trial court violated Newland's rights to due process and effectiveness of counsel by limiting counsel's closing arguments to facts within the record.

3. Whether Newland's constitutional guarantee against double jeopardy was violated in his three convictions of Rape of a Child in the Third Degree as they were manifestly apparent as separate and distinct crimes for the jurors based on the totality of the trial court record.

4. Whether this Court, if the State substantially prevails on appeal, should impose appellate costs upon Newland.

II. STATEMENT OF THE CASE

MME was born on December 23, 1998, and currently resides with her grandmother, aunt and cousin.[1] RP 66-67[2].MME was interested in helping other people and wanted to further her education to become a physical therapist assistant. *Id.* MME has never been married. RP 66. Between MME's seventh and ninth grade years, she became involved in a church in Packwood, Washington where she taught Sunday school. RP 69-70.

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[1]The victim, MME will be referred to by her initials in order to protect MME's identity and avoid confusion, no disrespect intended.

[2] There are three continuously numbered volumes for the jury trial, which will be referred to as RP. Other hearings will have the date in the citation.

During MME's seventh grade year, she met Newland (DOB 06/07/1983) while at a church function where Newland made a joking comment about MME being "too young to be drinking coffee". RP 70, CP 3. A few months later, MME encountered Newland again while at a Fourth of July party hosted by MME's Aunt Carol's boyfriend. RP 71.MMEstated that she had a brief conversation with Newland while getting a pop and Newland stated something to the effect of him being old enough to be her father which creeped MME out. *Id.* After MME's second interaction with Newland, MME and Newland later became friends on Facebook. RP 72.

MME and Newland used an internal feature of Facebook called Messenger to have private message conversations with each other. RP 73.MMEused a tablet she had received for Christmas or her birthday to have the conversations with Newland. *Id.* On the first day of conversing, Newland and MME discussed how much they liked each other, her family, and generally information for Newland to get to know MME better. RP 99. Then MME and Newland agreed to meet late that night at the High Valley 8 sign in Packwood after "talking dirty to each other." RP 74-76. MME believed she and Newland had sent roughly a thousand messages to each other before she deleted the majority of the messages. RP 100.

MME waited until her grandmother had fallen asleep to sneak out of the house and meet Newland that night. RP 76. Newland met MME at the High Valley 8 sign, and they walked down a trail away from the road where Newland would lay a blanket on the sand. RP 77-78. While MME was looking up at the stars, Newland kissed MME. RP 78. Newland also brought vodka and Coca-Cola for Newland and MME to drink, and after they had finished the flask, MME and Newland began kissing again. RP 78-79.

Newland then took MME's clothes off of her, and Newland's shirt was taken off and his pants were undone. RP 80. Newland then laid on top of MME while she was laying down, and they continued to kiss while Newland touched MME all over her body. RP 80. Newland and MME then proceeded to have sexual intercourse where Newland put his penis inside of MME's vagina while laying on top of MME until Newland ejaculated outside of MME on his hands. RP 81-83.

MME did not enjoy the intercourse as it hurt, and MME pretended to enjoy the intercourse for Newland. *Id.* Newland initially did not have a condom on when he and MME began to have sexual intercourse, then Newland later put on a condom, but Newland later took the condom off. RP 81. After finishing, Newland and MME got

dressed and proceeded to walk hand in hand, Newland stopping to kiss MME and put his hands inside her pants multiple times, back to the corner of the road near her house where they parted. RP 83-84.

During the walk back, MME told Newland that she liked him a lot, and Newland told MME he "couldn't believe he was falling in love with a fourteen-year-old, and that he wanted to run away and get married." RP 84. MME then snuck back into her home and went into the bathroom because she was hurting from the sexual intercourse. RP 84.MMEhad a hard time falling asleep that night as a result of the pain. *Id.*

The next day, MME and Newland had another conversation via Facebook Messenger where they agreed to meet each other again at the High Valley 8 sign later in the evening. RP 85. MME was afraid of being caught by her grandmother and disappointing her grandmother. RP 85. After MME's grandmother had went to bed, MME snuck out of the house and waited for Newland to meet her at the High Valley 8 sign. RP 86. Initially, Newland did not show, so MME returned home and messaged Newland on Facebook as well as posted a message on her Facebook wall about crying and feeling guilty. RP 86-87. After posting the messages, Newland replied to MME and agreed to try and meet again that very night. RP 89.

Again, MME snuck out of her house and met Newland who rode up on a smaller four-wheeler which MME refused to ride. RP 90. Both Newland and MME then walked to the same location they had been the night before near the water. RP 91. Newland then laid the blanket out again and began kissing MME. RP 91. Newland then took MME's clothes off and MME took Newland's clothes off. RP 91. Newland and MME then began to have sexual intercourse in a position of MME on her hands and shins with Newland behind her. RP 92. Newland did not wear a condom. *Id.*

During the intercourse MME told Newland that it hurt, so they changed positions to MME laying on her back with Newland on top of her. RP 93. After roughly 30-45 minutes, Newland then ejaculated in his hands outside of MME's body. RP 94. MME and Newland got dressed, and Newland walked MME home much the same way as the first time. *Id.* Newland again told MME he "could not believe he was falling for a fourteen-year-old, that he wanted to run away and get married, and if they were to get caught, he would wait for her." RP 107.

When MME was sneaking back into her home, her grandmother was getting up and MME had to sneak getting back into bed. RP 95. MME was still afraid of getting caught by her

grandmother. *Id.* MME also went to the bathroom and noted she was sore and bleeding, but she also noted she was not bleeding as heavily as the night before. *Id.*

The next day, MME posted a message on her Facebook wall about her eyes being puffy and red and also feeling hurt. RP 96-97. MME was feeling guilty about meeting Newland because she was "really falling" for Newland, and "knew that [they] could never be together." RP 97. MME also posted on her Facebook wall that day, July 13, 2013, stating, "Maybe I should rethink this sneaking out to meet this guy. Feeling lost." *Id.* At that point, MME decided she no longer wanted to continue sneaking out to meet Newland. RP 98. MME's Facebook conversations with Newland became less frequent as MME believed the only reason Newland had messaged her as frequently as he had previously was so Newland could "get with her." RP *Id.*

Roughly a month or two after the second time Newland and MME had intercourse, Newland began messaging MME so they could meet each other. RP 100. Newland was housesitting for either his mother or grandmother and was drinking coffee and invited MME over to have some with him. RP 101. MME rode her bike to the house

Newland was housesitting and remembered getting a wind burn on her face while riding the bike. *Id.*

As MME was riding up to the house Newland was housesitting, Newland jumped out from a bush near the front of the house scaring MME. RP 102. Newland and MME then went into the house where Newland poured MME a cup of coffee. RP 102-103. While MME was drinking her coffee, Newland grabbed MME's hips from behind pulling her close to him, and then Newland began to kiss MME's neck. RP 103. Newland then led MME to a camp trailer inside of a shed on the property so Newland's brother would not hear what Newland and MME were doing. RP 104.

Inside the trailer Newland and MME began kissing before Newland pulled MME into his lap facing him when he sat down. RP 105. While kissing, Newland told MME he had missed her. *Id.* Both Newland and MME undressed and laid down with Newland on top of MME. *Id.* Newland then penetrated MME without a condom on. *Id.* MME commented on Newland's lack of condom, and Newland put a condom on and continued to have intercourse with MME; Newland was gentler with MME this time. RP 105-106. After finishing, Newland hastily dressed and Newland and MME left the camp trailer. RP 106. MME felt that Newland did not really care for her, but played

it off as being hard-to-get with Newland before leaving shortly thereafter on her bike. *Id.*

The next time MME had any communications with Newland was after she moved into town in Packwood, early in 2014. RP 108. On January 6, 2014 at 8:45 pm, Newland and MME had a Facebook Messenger conversation where Newland wanted MME to meet him, and Newland stated, "I need you." RP 117-119. MME told Newland she did not want to see him because she did not want to ride her bike out that far to him, and Newland responded that he was coming into town, and that he had places where he hung out alone. RP 119-120. MME lied to Newland stating she could not get out of the house until 1:00 a.m. because she did not want to see Newland. RP 120-121. Newland stated he could not be in town that long and then asked MME where she had moved to. RP 121-122.

MME told Newland where she had moved in town in Packwood, and Newland responded, "So close but yet so far away. Man. I want to see you so bad." RP 122. MME responded, "Stop. You're making me want to even more." *Id.* Newland then wrote, "Good. Go for a walk. I promise we won't be seen together." *Id.* MME told Newland she could not be seen with him and could not leave the

house. RP 122-123. Newland and MME's conversation ended, and Newland and MME did not meet that night. RP 123.

Newland's conversations with MME over Facebook Messenger, over the course of their interaction, talked about multiple things including MME's family history of her parents not being in her life, MME's grandma, and about their affection for each other. RP 132. MME liked talking to Newland because he paid attention to her. *Id.* At some point during these conversations, Newland asked MME for nude photos of herself, but MME refused to do so. RP 132-133.

At some point after the third time Newland and MME had sexual intercourse, MME's grandmother found out MME was friends with Newland on Facebook, and MME's grandmother became upset with MME. RP 133-134. MME lied to her grandmother about the nature of her relationship with Newland stating she and Newland were only friends. *Id.* MME did this because she was afraid her grandmother would be ashamed of her, and MME lied because she did not want to get Newland in trouble. RP 134.

After MME's confrontation with her grandmother, MME contacted Newland telling him about the confrontation and to tell him she thought she might be falling in love with him. RP 133. Newland responded by telling MME to delete all of the messages between

them just in case. *Id.* MME successfully deleted the majority of the messages between herself and Newland with the exception of 200-300 messages. RP 100. Also, MME was selective in who she told she was having a sexual relationship with Newland, and MME never disclosed Newland's identity to anyone. RP 135.

At some point after the confrontation with MME's grandmother, MME's principal received a reporting that MME was in a sexual relationship with Newland. *Id.* MME's principal then contacted MME's grandmother regarding the report which resulted in another confrontation between MME and her grandmother. *Id.* After the confrontation, MME, in February of 2014, disclosed to her counselor, Shiloh Reynolds, her relationship with Newland. *Id.*, RP 33, 44, 48.

MME felt very awkward discussing her and Newland's relationship with Dr. Reynolds because MME looked up to Dr. Reynolds and MME felt Dr. Reynolds would not be proud of MME anymore. RP 135. Dr. Reynolds observed that MME appeared ashamed and embarrassed in disclosing her relationship with Newland. RP 45. MME told Dr. Reynolds MME and Newland had sexual intercourse multiple times, and that MME met Newland through church. *Id.* MME also told Dr. Reynolds Newland was

incredibly nice to MME and said nice things to her like he loved her. *Id.* At that time, Dr. Reynolds informed MME Reynolds was a mandatory reporter and would be forwarding what MME had disclosed to the proper authorities. *Id.*

On February 23, 2014 and March 7, 2014, Deputy Anderson of the Lewis County Sheriff's Office received referrals regarding MME and Newland's relationship from MME's principal and Dr. Reynolds, respectively. RP 219. On March 8, 2014, Deputy Anderson contacted MME, her grandmother, and MME's aunt at MME's home in Packwood. RP 136-137, 220.

Deputy Anderson obtained a recorded statement from MME while at the residence. RP 137, 221-223. Deputy Anderson also obtained copies of Facebook Messenger conversations between MME and Newland that were printed by MME's grandmother and aunt while in MME and Deputy Anderson's presence, and Deputy Anderson took MME's tablet as evidence. RP 110-111, 117, 223-228. After obtaining MME's statement, the copies of the Facebook Messenger conversations, and MME's tablet, Deputy Anderson had MME direct him to the physical locations where MME and Newland had sexual intercourse. RP 228-229. Deputy Anderson later met with Newland, and after Deputy Anderson read a portion of the Facebook

conversations to Newland, Newland admitted the conversations were between himself and MME. RP 229-230.

On December 31, 2014, Newland was charged with two counts of Rape of a Child in the Third Degree. Supp. CP Information.[3] On July 30, 2015, Newland's charges were amended to include a third charge of Rape of a Child on the Third Degree. CP 1-2. On September 8, 2015, Newland's case proceeded to jury trial. RP 1. On September 9, 2015, Newland was found guilty of three counts of Rape of a Child in the Third Degree. RP 310.

On November 8, 2015, Newland was given an exceptional sentence of 60 months for counts I and II. CP 70-81. Newland was given 0 months for count III. *Id.* Counts I and II ran concurrent to each other while count III ran consecutive. *Id.* This allowed Newland to serve 36 months of community custody on count III despite getting statutory maximum sentences on counts I and II. *Id.* Newland timely filed for appeal. CP 90.

The State will supplement the facts as necessary throughout its argument below.

[3] The State will file a Supplemental Clerks Papers to include the original Information filed in this case.

III. ARGUMENT

A. NEWLAND RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Newland argues ineffectiveness of counsel because trial counsel did not object to the admittance of grooming testimony. Brief of the Appellant 6. Newland's trial counsel provided competent and effective legal counsel because grooming evidence was used to explain the behavior of MME. Therefore, Newland's ineffective assistance of counsel claim fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Newland's Attorney Was Not Ineffective During His Representation Of Newland Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Newland must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

"Expert testimony implying guilt based on the characteristics of known offenders is the sort of testimony deemed unduly prejudicial and therefore inadmissible." *State v. Braham*, 67 Wn. App. 930, 937, 841 P.2d 785, 789-90 (1992); *see State v. Petrich*, 101 Wn.2d 566, 576, 683 P.2d 173, 179 (1984). A victim's behavior could conceivably be explained by grooming evidence, in an appropriate case. *State v. Braham*, 67 Wn. App. 930, 938 n.5, 841 P.2d 785, 790 (1992). Expert witnesses may present evidence which would corroborate testimony of another witness if credibility of the witness is an issue. *Petrich,* at

575. The admissibility of expert testimony requires the information presented to likely assist the jury in understanding evidence. *Id.*; *see* ER 702; *Swartley v. Seattle Sch. Dist. 1*, 70 Wn.2d 17, 421 P.2d 1009 (1966).

During pre-trial motions, Newland's counsel objected to the use of medical records generated by Dr. Reynolds regarding a conversation between MME and Reynolds discussing grooming. RP 16-17. The trial court did not rule on the admissibility of the medical records stating that any determination would have to be decided during the course of questioning Dr. Reynolds as it was unknown to the trial court, at that time, what line of questioning would elicit a response regarding grooming. RP 17.

Dr. Reynolds was called as a witness during the State's case-in-chief. RP 42-61. During direct examination Dr. Reynolds testified to the general definition of grooming with no objections or to any proceeding questions regarding grooming:

> Grooming is a process which somebody who is a sexual predator will engage in with trying to get victims. They will treat them really nice or befriend them or give them gifts or tell them they are going to be there for them for the intent and purposes of winning their trust and to build a relationship with them so that -- for the purposes of having a sexual encounter.

RP 46. Dr. Reynolds then testified to the general effects grooming has on children:

> Well, a child can become incredibly attached to an individual. And that's why the process of grooming is used, because that child becomes very attached and doesn't want to betray the individual, doesn't want to lose the love portions or the gifts portions, depending on which route the person, the groomer, takes in building that relationship. It's horrible. It sets that child up for a long time of mistrust and -- because it backfires. But also it causes a lot of confusion for the child, because they have grown to trust and love somebody, then they need to protect them. And they have all kinds of mixed feelings and emotions that they can't deal with.

Id. Dr. Reynolds then testified to discussing grooming with MME and MME telling Dr. Reynolds MME believed that was happening to her. RP 47. Dr. Reynolds followed that testimony with how MME felt about her relationship with Newland and what kind of emotional state MME was in while telling Dr. Reynolds these things:

> She was confused. She said she felt often sick to her stomach. She was feeling sick a lot. She was feeling really awful about her family's worry and concern over her. She felt really awful about her family's view of her, and she felt like she disappointed them. [. . .] She was really distraught. She was crying throughout her disclosure, through that session.

Id. Later, Dr. Reynolds again testified to the mental state and levels of culpability MME felt for herself for being in a sexual relationship with Newland:

> We talked about responsibility of the incident that had happened and the circumstances that had happened with Logan. We talked about who was responsible for that and his age and all of the factors around how she wasn't responsible, because she had a lot of self-blame there.

RP 48.

On cross-examination, counsel for Newland questioned Dr. Reynolds about the general grooming behaviors she had testified to on direct examination and if MME's accounting of Newland matched. RP 56-59. Dr. Reynolds testified that saying you love someone or giving gifts could be something that happens when grooming, and that Dr. Reynolds had not been told of any gifts sent to MME from Newland and that all interactions reported to Dr. Reynolds were solely through MME. *Id.*

On redirect, the State asked if MME's depressive disorder would make her more vulnerable to a sexual predator. RP 59. Dr. Reynolds responded it could because:

> [MME] has some family issues going on, some environmental issues that were happening at the time that helped make her feel secluded and isolated and

> not confident. That can be certainly a place where somebody gets victimized, because when somebody begins to show them attention and affection of any sort, it feels good to that individual.

RP 60. Dr. Reynolds then testified about immediate disclosure of minor victims and a victim's general motivations for not immediately disclosing sexual abuse and specifically how MME's motivations:

> Because children who are abused don't – they don't have the understanding or they are told not to tell or they have that -- if it was a grooming process or a relative, they don't want to betray that person. If it's a friend of the community or, say, a church, they don't want to out that person because of the consequences of that. They don't want to get in trouble, they don't want to -- in her case may not want to have been blamed for it.

RP 60-61. Again, the State asked Dr. Reynolds about grooming, specifically when and why grooming was discussed as part of MME's counseling and treatment:

> How she said that he was saying a lot of nice things to her. She had some problems in her family where people were -- there was a lot of conflict, and she was feeling like people weren't being nice to her. So she was really eating it up, and she had pleasure in her eyes when she said, he was being very nice to me and he says he loves me. And the way she said it, it just red flagged it for me.

RP 61.

On re-cross examination, Newland's counsel asked Dr. Reynolds if because of MME's family situation and subsequent depressive disorder MME would actively seek out relationships and also embellish as to the nature of the relationship. RP 61-64. Dr. Reynolds stated that MME would actively seek out relationships that would not necessarily be sexual, and MME did not exhibit any behavior MME was embellishing the nature of her relationship with Newland. *Id.*

Lisa Wahl, a nurse practitioner at Providence St. Peters Hospital, was also called as a witness during the State's case-in-chief to discuss the medical examination performed on MME after disclosing the nature of her relationship with Newland and the demeanor of MME while collecting information for the medical examination. RP 118-216. Wahl testified to how MME's demeanor changed when MME disclosed her relationship with Newland:

> She was crying. She cried when she talked about her siblings, because she was estranged from them all. One was murdered. She cried about the sexual abuse because she let her grandma down. She felt that she let her grandma down because her grandma had been the only person that had been there for her for her whole life, and here she let her down, quote, again, unquote.

RP 194-195. Wahl testified, with no objections, to the conversation she and MME had regarding MME's reasons for feeling guilty for the relationship between MME and Newland:

> We talked about her being 14 and her alleged offender being 30 years old. And she blames herself. She blames herself because she felt that she made a decision; she made a choice. She was not able to understand that she was 14 years old, and when you are 14 and you have an alleged offender who is 30 years order, that, in fact, what is happening is that there is a child who is being groomed. Anybody who is having sex with a 14-year-old going through a grooming process of telling them -- and these are her words -- that he loved her; that he wanted to kidnap her and marry her; that she couldn't tell, because if she did, he would go to jail; that she knew at 14 that it was against the law. And so she blamed herself because she was breaking the law. She had taught his children in the Sunday school class that she taught at church, and she had a lot of misguided ownership of what had happened to her.

RP 195. Wahl then testified that the reason for having this conversation with MME was for medical treatment as the incidents described by MME and MME's behavior and feelings regarding the incidents could have both short-term and long-term adverse effects. RP 198. Finally, on direct examination, Wahl stated again, without objection, the reasoning for discussing grooming with MME:

> But as I was telling you before, it's that mental health long-term fallout that I really wanted to impress upon

> her a necessity for therapy, therapy with somebody who is professionally trained in trauma. Because that is where she's going to get her mental health healing. It will provide her with guidance as she is able to experience and process her feelings and hopefully help her establish some healthy personal boundaries, some healthy coping strategies, some healthy guidelines on just general good healthy relationships. She is entering into that age where she may be dating soon enough.

RP 205.

On cross examination, Newland's counsel questioned Wahl on the use of the word victim relating to MME and why it would be used in certain circumstances and in others not:

> So if a 14-year-old has been -- if a 14-year-old has sex with a 30-year-old, that means that a 30-year-old has enticed a 14-year-old to have sex. A 30-year-old has a lot more global knowledge, coping skills, just general life experience that a 14-year-old budding child into adolescence and into adult does not have. So a 14-year-old is naive. A 30-year-old is not. A 14-year-old is a victim. A 30-year-old is not.

RP 205-207. Wahl further elaborated when discussing what would make an individual naïve:

> So what I think of naive is something that I've never done before. This is a new experience that I don't have any knowledge base. I don't have any history to draw from. I don't have that trial and error. I don't have knowledge of relational standards, normative behaviors, I don't have the knowledge of what to expect next. So if a 14-year-old is being told by a 30-year-old that he loves her, he wishes he could marry her and

> kidnap her, as a 14-year-old, this is all very romantic, because that's all I have to go on is I'm naive. I know nothing more than what is being given to me in the moment.

RP 207-208. Finally, Wahl describes how and why MME reacted to being in a similar situation:

> I'm saying that [MME] was given information from an adult who has the means of access, who has the means of opportunity, who has the means of basic grooming behaviors, so that a child would not recognize, that a child being exploited would not recognize that they are actually being targeted for sexual abuse. A 14-year-old would think that she's falling in love with a man.

RP 208.

In closing argument, the State discussed grooming within the context of the credibility of MME and any self-interest MME would have in not disclosing the nature of her relationship with Newland:

> Now, you heard testimony from her counselor about the whole aspects of grooming. Somebody who is older, somebody who has more, as Lisa Wahl indicated, more experience in the world, someone who is not naive, someone who is using flattery, attention, getting them to love so to reduce the possibility that they will report it to somebody else, that that's all a grooming pattern, and that Ms. Reynolds recognized that right away. So did Lisa Wahl. She recognized it as well and commented on it and talked about it as a concern. It was something that [MME] had no clue about. Even when -- even now when she's talked to

> these professionals, she's still of the impression that this was her fault and that she is to blame.

RP 287. The context for discussing grooming throughout the course of trial was solely for the purpose of providing the jury guidance and clarity to the motivations and behaviors of MME while disclosing to the medical experts her relationship with Newland, and for the testimony given by MME.

At no point during the course of trial was the use of grooming evidence used to profile Newland. Neither experts nor the State stated that because Newland had allegedly acted in a way which could be considered grooming Newland must have sexually assaulted MME. Dr. Reynolds did discuss the general meaning of grooming, but Dr. Reynolds did not use the general grooming evidence to testify Newland was guilty of sexually assaulting MME because MME's disclosure of her relationship with Newland elicited Newland had acted in a way which could be considered grooming. RP 46.

Repeatedly, experts testified and the State argued that the proof of a sexual relationship between MME and Newland was from MME's disclosure, and grooming was discussed in the context of why MME would delay disclosure, how MME's behavior could be

explained in her counseling sessions and medical exam, and why MME would behave as she did while testifying against Newland. Therefore, the use of expert testimony, in this circumstance, would be considered admissible as it was not used as profile evidence but rather for the purpose of explaining MME's delayed disclosure and behavior exhibited.

Newland's counsel was not deficient because counsel had legitimate tactics for whether counsel chose to object or not during the course of trial. During motions in limine, Newland's counsel stated he had objections to the content of Dr. Reynolds report regarding grooming. RP 17. This implies Newland's counsel was aware to the limitations of expert testimony regarding grooming, therefore, the lack of any legitimate objection that may have been possible would have to fall within the "wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

As there is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance," one can look at the trial record to get an indication that Newland's counsel had legitimate tactic to not object to the grooming testimony. *Reichenbach*, 153 Wn.2d at 130. At one such instance, the trial court

inquired into possible hearsay objections Newland's counsel did not make, and at that time, Newland's counsel stated it was part of trial tactic. RP 241. Newland's counsel was not deficient, and this Court should affirm Newland's convictions

3. Arguendo, If This Court Should Determine Newland's Trial Counsel Was Deficient, Then Any Deficiency Which Could Be Found Did Not Reach A Magnitude Which Would Have Prejudiced Newland's Defense.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Horton*, at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

The State's case-in-chief had direct testimony from MME stating she had a sexual relationship with Newland. RP 65-187. MME's testimony was further corroborated with Dr. Reynolds, Wahl, and Deputy Anderson's testimony of MME's disclosures to each about her relationship with Newland. RP 42-61. 188-217, 217-248.

Further, MME and Deputy Anderson both testified to the Facebook messages which were between MME and Newland as well as public posts on MME's Facebook wall, all of which were

admitted for the jury to use for deliberations. RP 87-90, 96-98, 116-125, 132-133, 154-160, 164.168, 171-172, 182-183, 223-228. Also through Deputy Anderson's testimony, Newland had admitted to the messages being message conversations between MME and Newland. RP 229-230.

Based on the other evidence presented by the State over the course of trial against Newland for three counts of Rape of a Child in the Third Degree, there is a reasonable probability the trial outcome would not have been different. *Horton*, at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694. Therefore, any determined deficiency of Newland's counsel would not have prejudiced Newland's defense. Again, this Court should affirm Newland's convictions because Newland received effective assistance of counsel.

B. THE TRIAL COURT DID NOT VIOLATE NEWLAND'S RIGHTS TO DUE PROCESS AND TO THE ASSISTANCE OF COUNSEL BY LIMITING NEWLAND'S CLOSING ARGUMENTS.

Newland alleges the trial court violated his right to due process and to the affective assistance of counsel by sustaining objections by the State which limited the scope of his closing argument. Brief of the Appellant 10-13. The trial court did not abuse its discretion in limiting Newland's closing argument to facts within the record.

1. Standard Of Review.

"This court reviews a trial court's action limiting the scope of closing argument for abuse of discretion. This court will find that a trial court abused its discretion 'only if no reasonable person would take the view adopted by the trial court.'" *State v. Frost*, 160 Wn. 2d 765, 771, 161 P.3d 361, 365 (2007) *quoting State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000) (citations omitted).

2. The Trial Court Did Not Err By Limiting Newland's Closing Arguments.

When determining the scope of counsel's closing arguments, trial courts possess broad discretionary powers. *Frost*, 160 Wn. 2d at 771-72, 161 P.3d 361, 365; *see also Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); *Perez-Cervantes*, 141 Wn.2d at 474-75; *City of Seattle v. Erickson*, 55 Wn. 675, 677, 104 P. 1128 (1909). Trial courts should "in all cases ... restrict the argument of counsel to the facts in evidence." *Id.* 141 Wn.2d at 475; *quoting Sears v. Seattle C.S. Ry.*, 6 Wn. 227, 233, 33 P. 389, 33 P. 1081 (1893)).

> Although trial courts possess discretion over the scope of closing argument, a limitation that goes too far may infringe upon a defendant's Sixth Amendment right to counsel. When a court's limitation of argument relates

> to a fact necessary to support a conviction, the defendant's due process rights may also be implicated.

Frost, 160 Wn. 2d at 768, 161 P.3d 361, 363-64. Closing argument is of particular importance to the effective exercise of the right of counsel to argue to the case to a jury under the constitutional right to be represented by counsel. *Id.* at 773, 161 P.3d 361, 366; *see Perez-Cervantes*, 141 Wn.2d at 474; *Erickson*, 55 Wn. at 677; *State v. Mayo*, 42 Wn. 540, 548-49, 85 P. 251 (1906). "Closing argument 'is the defendant's last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.'" *Id.* at 778, 161 P.3d 361, 369, *quoting Perez-Cervantes*, 141 Wn.2d at 474 (citations omitted).

During closing argument, Newland's counsel attempted to argue a general denial by stating the following with subsequent objections and rulings:

> MR. UNDERWOOD: She gets mad at my client, decides that he has wronged her, and my client's position is that he never had sex with her. I mean, it's that simple.
>
> MS. WEIRTH: Objection. Not in evidence.
>
> THE COURT: I'll sustain that.
>
> MR. UNDERWOOD: Remember Deputy Anderson said that my client was cooperative, that he gave a

> statement to police. If my client had admitted to having sexual contact –
>
> MS. WEIRTH: Objection, your Honor.
>
> THE COURT: Go on with your argument. I want to hear this.
>
> MR. UNDERWOOD: If my client had admitted to Deputy Anderson that he had had sex with [MME], don't you think that he would have testified to that on the stand?
>
> MS. WEIRTH: Objection.
>
> MR. UNDERWOOD: You don't have that.
>
> THE COURT: I will sustain that.

RP 299-300. At no point during direct or cross-examination of MME did MME state she was mad at Newland, and that her anger was the motivating factor for MME to disclose her relationship with Newland. RP 65-187. Also, no question from the State or Newland's counsel was asked to Deputy Anderson on whether Newland had admitted to or denied the allegations against him, nor did Deputy Anderson freely disclose statements of admittance or denial by Newland while testifying. RP 217-248. Therefore, there were no facts in evidence to establish Newland's denial of having a sexual relationship with MME, and this Court should affirm Newland's convictions.

3. Arguendo, If The Trial Court Erred By Limiting Newland's Closing Argument, The Error Was Harmless.

"A constitutional error does not automatically require reversal of a conviction, the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 1263 (1991). A harmless error analysis is conducted to determine whether a trial court's mistake in limiting closing argument has affected the outcome of a case. *Frost*, 160 Wn. 2d at 780-81, 161 P.3d 361, 370 (2007). If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. *Rose v. Clark*, 478 U.S. 570, 579, 106 S. Ct. 3101, 3106 (1986).

The proper harmless error analysis in Washington is the "overwhelming untainted evidence" test which requires appellate courts to only look at untainted evidence presented at trial and determine if the evidence is so overwhelming it "necessarily leads to a finding of guilt." *Frost*, 160 Wn. 2d 765, 782, 161 P.3d 361, 370. "A finding of harmless error requires proof beyond a reasonable doubt that 'any reasonable jury would have reached the same result

in the absence of the error.'" *Id.*, *quoting Fulminante,* 499 U.S. 279, 425, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

As stated in above arguments, the jury in Newland's case would have reached the same result due to the overwhelming evidence provided in MME, Dr. Reynolds, Lisa Wahl, and Deputy Anderson's testimonies and in the submitted records of MME and Newland's Facebook Messenger conversations and wall postings. It is for those reasons this Court should affirm Newland's convictions as Newland's due process and assistance of counsel rights were not violated.

C. NEWLAND'S GUARANTEE TO BE FREE FROM DOUBLE JEOPARDY WAS NOT VIOLATED BECAUSE IT WAS MANIFESTLY APPARENT TO THE JURY HIS THREE CONVICTIONS WERE BASED ON SEPARATE AND DISTINCT ACTS BASED ON THE TOTALITY OF THE RECORD.

Newland alleges the trial court violated his ability to be free from double jeopardy by failing to instruct the jury the three charges of Rape of a Child in the Third Degree had to be based on separate and distinct acts. Brief of the Appellant 13-15. The trial court did not violate Newland's ability to be free from a double jeopardy violation because it was manifestly apparent to the jury that the three charges were based on three separate and distinct acts.

1. Standard Of Review.

"We review challenges to jury instructions de novo, within the context of the jury instructions as a whole." *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529, 533 (2008).

2. There Was No Double Jeopardy Violation Because The Totality Of The Court Record Made It Manifestly Apparent The State Was Not Seeking To Impose Multiple Punishments For The Same Offense.

Defendants are protected from multiple punishments for the same offense under the constitutional guarantee against double jeopardy. *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991); *see* U.S. Const. amend. V; Wash. Const. art. I, § 9. Double jeopardy claims may be raised for the first time on appeal. *State v. Mutch*, 171 Wn.2d 646, 661-62, 254 P.3d 803, 812 (2011); *see State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Jury instructions lack clarity when "the need to find that each count arises from a "'separate and distinct'" act in order to convict" is not expressly stated in jury instructions. *Id.* at 662; *quoting Berg*, at 925; *see State v. Carter*, 156 Wn. App. 561, 568, 234 P.3d 275, 278 (2010). When flawed jury instructions are given to a jury, a defendant will *potentially* receive multiple punishments for the same offense, but that does not necessarily mean a defendant has received multiple punishments for the same offense. *Id.* at 663 (emphasis added).

When considering a double jeopardy claim, "review is rigorous and is among the strictest" when a court looks to the entire trial record for consideration. *Id.* at 664. When considering the totality of the court record, if the record lacks clarity that it was "*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense," and that each count was based on a separate act, a double jeopardy violation has occurred. *Id.*; *quoting Berg*, at 931 (emphasis added).

While instructions to the jury lacked an instruction stating the jury needed to find each count as separate and distinct charges,[4] it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments on Newland for the same offense of Rape of a Child in the Third Degree. Newland argues his case is not analogous to the facts of *Mutch* which fall into the "rare circumstances" of manifestly apparent separate and distinct acts for the jury to deliberate on. Brief of Appellant 15, *quoting Mutch*, at 665.

In *Mutch*, defense counsel did not challenge the victim's credibility as to the number of rapes which had occurred. *Id.* During cross-examination and in closing, Newland's counsel did challenge MME's credibility as to the number of times MME and Newland had

[4] WPIC 4.25 based on *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

sexual intercourse. RP 140-185, 187, 294-301. While Newland's case is not analogous to *Mutch* in this regard, the totality of the record in Newland's case shows manifestly apparent, separate and distinct acts for jury deliberation.

During MME's testimony, MME recounted her relationship with Newland. RP 65-187. MME recounted three separate times she and Newland had sexual intercourse. RP 65-132. Newland's counsel questioned MME about the number of times she had sexual intercourse with Newland, what had occurred each time, and MME repeatedly stated she had sexual intercourse with Newland three times. RP 144-185. The reference to three separate instances of sexual intercourse occurred at multiple times within the course of the trial through examination of witnesses and the closing arguments of both the State and Newland. RP 74-84, 90-94, 94, 100-108, 133, 144, 145, 149, 152, 159, 161, 162, 173, 178, 180, 194, 221, 237, 238, 281, 286, 288-289, 292, 295-303.

Further, in Newland's closing, Newland's counsel explicitly states the jury's role of either convicting or not convicting his client was to regard each of the three times MME and Newland allegedly engaged in sexual intercourse as three separate and distinct acts for which three separate and distinct convictions could be made:

> Three counts, you need to decide each one separately. Just because you say, okay. Fine. He's not guilty of one, he must be not guilty of the others, just because you may say, oh, he may be guilty of one, that makes him guilty of all the others. That's not the case. You need to determine each one individually to reach verdicts on all three of them and to deliberate on them separately. You shouldn't be mixing up the counts or discussions on them.

RP 292. While the State did say in closing to "not pay attention" to what either attorney said, as Newland argues, this is taken out of context. Brief of the Appellant, 15; RP 304. The State's comments in closing about attention the jury should give was in regards to the credibility of MME and her ability to recount the exact events of each time MME and Newland had sexual intercourse, not in regards to the number of times:

> Defense counsel suggested there were all sorts of inconsistences, and he even suggested certain things were said. And I would suggest to you that you not pay attention to what he says; don't pay attention to what I say about what was said. Pay attention to what you all heard, because it isn't necessarily going to be accurate coming from our mouths.

Id. It is based on the extensive use of three separate events provided in testimony and argument, and the request of Newland's counsel that the jury look to each testified sexual act as separate and distinct for the purpose of deliberation on three counts of Rape of a Child in the Third Degree, that any error is harmless beyond a reasonable

doubt. This Court should affirm Newland's three convictions of Rape of a Child in the Third Degree.

D. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE IF THIS COURT AFFIRMS THE JUDGMENT.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). As the Court pointed out in *State v. Sinclair*, the award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair,* 192 Wn. App. 380, 385, 367 P.3d 612 (2016); *See also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976[5], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 82 Wn.2d 814, 557 P.2d 314 (1977), the

[5] Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

Nolan, 141 Wn.2d 620, noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. *Keeney*, 112 Wn.2d at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. *Id. a*t 628. The Court also rejected the concept or belief, espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, at 624-625, 628.

In *Nolan*, as in most other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in *Blank*, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *Sinclair*, prematurely raises an issue that is not before the Court. *Sinclair,* 192 Wn. App. at 390-91. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*,

131 Wn.2d at 241–242. *See also State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. *See State v. Lundy*, 176 Wn. App. 96, 104, n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See State v. Woodward*, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See Blank* at 236-237, quoting *Fuller v. Oregon*, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.*, at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.*, at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should

excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Division I pointed out in *State v. Sinclair*, the Legislature did not include such a provision in RCW 10.73.160. *Sinclair,* 192 Wn. App. at 389. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. Hopefully, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. It should be the burden upon the defendant to make this record that he or she is unable to pay, as he or she holds all the cards, so to speak. The State is unable to refute much of what a defendant asserts to the trial court regarding their ability to pay, unless information has come out during the trial or other hearings that contradicts the defendant's assertions. Without a factual record the State has nothing to respond to.

In this case, Newland was granted court appointed counsel for trial proceedings under the reasoning Newland was indigent. CP 93. At the conclusion of Newland's trial proceedings, an Order of Indegency Authorizing the Defendant to Seek Review at Public Expense and Providing for Appointment of Attorney on Appeal was granted on December 2, 2015. CP 91-92. Unless Newland can provide this Court record of his inability to pay any costs due to indigency, we ask this Court to determine appellate costs are appropriate if the State substantially prevails on appeal.

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IV. CONCLUSION

Newland's trial counsel provided effective assistance of counsel in not objecting to the use of expert testimony on grooming when used to explain and clarify MME's behavior and motivations. The trial court did not violate Newland's rights to counsel or due process in exercising its discretion to limit Newland's closing argument to facts within evidence on admissions of guilt or innocence. Newland's constitutional guarantee against double jeopardy was not violated as it was manifestly apparent to the jury Newland was being potentially convicted on three separate and distinct acts of Rape of a Child in the Third Degree. This Court should affirm Newland's convictions and award costs.

RESPECTFULLY submitted this 5th day of August, 2016.

JONATHAN L. MEYER
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by: _____
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and: _____
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Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. LOGAN HOSEPH NEWLAND, Appellant.	No. 48416-1-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney and Amber Caulfield, Rule 9 Intern, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On August 5, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Skylar Texas Brett, attorney for appellant, at the following email addresses: skylarbrettlawoffice@gmail.com.

DATED this 5th day of August, 2016, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office